U.S. Department of Justice

Environment and Natural Resources Division

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DJ#90-11-2-1109

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CONFIDENTIAL SETTLEMENT DOCUMENT UNDER
FEDERAL RULE OF EVIDENCE 408

September __, 1998

VIA OVERNIGHT MAIL

The Honorable Joseph G. Scoville
Magistrate Judge
United States District Court
Western District of Michigan
666 Ford Federal Building
110 Michigan Street, N.W.
Grand Rapids, Michigan 49503

Re: United States v. City of Albion, Michigan et al., Civ. No. 1:97-CV-1037 (W.D. Mich.) - Albion-Sheridan Township Landfill Superfund Site.

Dear Judge Scoville:

Pursuant to the Court's Order Regarding Settlement Conference entered July 13, 1998, as modified by the Court's Notice of August 5, 1998, relating to the above-referenced matter, this constitutes the United States' Statement of Settlement Position for the September 15, 1998 Court-supervised settlement conference.

I. Case Status

The United States filed this action on December 11, 1997, against the City of Albion, Michigan (the "City"), pursuant to Sections 106(b), 107(a), and 113(g)(2) of CERCLA, 42 U.S.C. §§ 9606(b), 9607(a), and 9613(g)(2). In its first claim for relief, the United States seeks, under Section 107(a) of CERCLA, recovery of unreimbursed past costs incurred in connection with response actions by the U.S. Environmental Protection Agency ("U.S. EPA") at the Albion-Sheridan Township Landfill Superfund Site located at 29975 East Erie Road in Sheridan Township, Calhoun County, Michigan (the "Site"), and other response costs at the Site. The United States alleges that The City is liable under Section 107(a)(2) as the operator of the Site at the time of disposal of the hazardous substances. The United States also

seeks a declaratory judgment under 42 U.S.C. § 9613(g)(2), against the City for future response costs to be incurred by U.S. EPA in connection with the Site.

In its second claim for relief, the United States seeks civil penalties under Section 106(b) for violation of a Unilateral Administrative Order ("UAO"), Docket No. V-W-96-C-316, issued on October 11, 1995 by U.S. EPA under Section 106(a) to four potentially responsible parties ("PRPs") to conduct response actions at the Site. This claim is asserted against the City for its refusal to comply with the UAO.

On February 5, 1998, the City filed a Third-Party Complaint against Cooper and Corning, other PRPs identified by the U.S. EPA, but not named in the United States' principal Complaint. Additionally, in response to a Counterclaim filed against the City by Third-Party Defendant Decker Manufacturing, the City filed a Counterclaim against Decker on May 20, 1998. Cooper and Corning filed Counterclaims against the City alleging that the City is liable pursuant to CERCLA Section 107, 42 U.S.C. § 9607, and NREPA Section 20126, M.C.L. § 324.20126, for past and future response costs incurred and to be incurred by Cooper and Corning at the Site. Additionally, Cooper and Corning seek contribution from the City pursuant to CERCLA Section 113, 42 U.S.C. § 9613, NREPA Section 20129(3), M.C.L. § 324.20129(3), and common law contribution. Cooper and Corning also seek a declaratory judgment pursuant to the Declaratory Judgment Act, 28 U.S.C. § 2201 et seq., finding the City liable to Cooper and Corning for damages and response costs that have been or will be incurred at the Site.

Cooper and Corning also filed a Third-Party Complaint against Decker alleging that Decker is liable pursuant to CERCLA Section 107, 42 U.S.C. § 9607, and NREPA Section 20126, M.C.L. § 324.20126, for past and future response costs incurred and to be incurred by Cooper and Corning at the Site. Additionally, Cooper and Corning seek contribution from Decker pursuant to CERCLA Section 113, 42 U.S.C. § 9613, NREPA Section 20129(3), M.C.L. § 324.20129(3), and common law contribution. Cooper and Corning also seek a declaratory judgment pursuant to the Declaratory Judgment Act, 28 U.S.C. § 2201 et seq., finding Decker liable to Cooper and Corning for damages and response costs that have been or will be incurred at the Site.

Decker has filed a Counterclaim and Cross-claim against Cooper/Corning and The City, respectively, seeking contribution pursuant to Section 113(f) of CERCLA, 42 U.S.C. § 9613(f), Section 29(3) of NREPA, M.C.L. 324.20129(3), as well as common law, toward the response costs Decker has incurred in connection with the Site.

The parties' counsel in this case contacted the Court on July 6, 1998 to determine Magistrate Judge Scoville's willingness to conduct a settlement conference with the parties to pursue global resolution of all claims in this case.

This statement sets forth the United States' settlement position in this case, preceded by a brief Site history, description of the Site remedy and costs incurred by the United States, and the negotiations history and status.

II. Site History

The Albion-Sheridan Township Landfill Superfund Site is an inactive municipal landfill located east of the City in Sheridan Township, Calhoun County, Michigan. The landfill, which covers approximately 18 acres, was widely used for residential, municipal, commercial and industrial waste disposal from approximately 1966 to 1981. In the early 1970s, the Michigan Department of Natural Resources ("MDNR") allowed the landfill to accept metal plating sludges, described as insoluble hydroxides and carbonates. Other materials, such as paint wastes and thinners, oil and grease, dust, sand and dirt containing flyash and casting sand, are reported to have been disposed of at the landfill. The North Branch of the Kalamazoo River is approximately 400 feet south of the Site. Several residences are located within 500 feet, including the Amberton Village subdivision adjacent to the Site on the east, the Orchard Knoll subdivision 1500 feet from the Site on the west, and a single residence adjacent to the Site on the south. Drinking water for 35,000 persons is obtained from public and private wells within a three-mile radius of the Site.

Prior to 1966, the Site was used as a gravel pit and was also used for open, unpermitted dumping. Both gravel mining and open dumping occurred on the southern half of the Site, on a lot that was purchased by Gordon Stevick in 1953. In February 1966, the City, after searching for a dump site to handle its municipal and industrial wastes, generated by industries located nearby, licensed and executed an agreement with Mr. Stevick "to provide and maintain a waste yard for the use of City of Albion residents and industries." During the next fifteen years, the Site was the main landfill for the City and surrounding communities pursuant to several agreements between the City and Mr. Stevick. During its operational period, local industries used the Site for disposal of industrial wastes. In September 1981, the landfill closed by action of the MDNR after continuing problems with daily operations were noted by the Calhoun County Health Department during the 1970s, and MDNR sampling of Site wastes in 1980 showed the presence of metallic sludges containing cyanide and heavy metals.

A pre-remedial site investigation performed by U.S. EPA in March 1986 suggested that the landfill accepted as much as 6,000

cu. yds. of heavy metal sludge and 35,000 drums of paint wastes and spent solvents during its years of operation. As a result of this investigation, and others conducted by both U.S. EPA and MDNR, the landfill was placed on the National Priorities List on October 4, 1989, 54 Fed. Reg. 41000, 41021.

Subsequently, in two separate investigations in August and October 1989, U.S. EPA determined that various waste containers on-Site contained volatile organic solvents ("VOCs"), including ethylbenzene, toluene, tetrachloroethylene, 1,1,1-trichloroethane and xylene.

III. Site Remedy/Costs

U.S. EPA issued a UAO to five PRPs in March 1990 to implement a removal action for sampling of containers and waste streams, waste containerization, transport and disposal of wastes and Site security. Two PRPs, Eagle-Picher Industries, Inc., an adjudicated bankrupt, and Seiler Truck Services, Inc., a small City of Albion business, performed the removal, valued at $100,000, in September 1990.

In June 1991, U.S. EPA sent special notice letters to six PRPs, to begin negotiations for conducting a remedial investigation/feasibility study ("RI/FS") at the Site. No good faith offer was submitted by U.S. EPA's deadline, and as a result, U.S. EPA performed the RI/FS and issued a Record of Decision in March 1995. The remedy provides for: (a) removal and off-Site treatment and disposal of drums containing hazardous wastes; (b) construction of a solid waste landfill cap consisting of a flexible membrane liner; (c) installation of an passive landfill gas collection system; (d) long term monitoring to ensure that the remedy is effectively lowering hazardous substances in the groundwater; and (e) institutional controls to limit land and groundwater use on-Site and groundwater on adjacent property. A contingent remedy of in situ oxidation is provided in the event groundwater contaminant levels are not timely and/or sufficiently lowered. The capital costs for the remedy estimated in the ROD are approximately $2.6 million. Operation and maintenance ("O&M") costs are estimated currently to be approximately $538,000. Total remedy costs, therefore, are approximately $3.1 millio[illegible] Is this Jon's new estimate?

The City, Cooper, Corning and Decker were offered the opportunity to undertake the remedial design and remedial action ("RD/RA") during negotiations conducted in the summer of 1995. Negotiations failed, however, and U.S. EPA issued a UAO to the four PRPs in this case requiring them to conduct the RD/RA. Corning and Cooper are performing the RD/RA and are currently in compliance with the UAO, having recently completed the remedial design. Remedial action construction is scheduled to begin this

construction season.

Of the remaining two parties, Decker has agreed to perform certain aspects of the RD/RA assigned to it by U.S. EPA and the complying PRPs, including acquisition of neighboring properties to facilitate implementation of the RD/RA. The City, on the other hand, has not complied with the UAO to date.

U.S. EPA has incurred response costs totaling $2,195,169.25, excluding prejudgment interest, through May 31, 1998, primarily for the conduct of the RI/FS leading to the selection of the remedial action currently being implemented by certain PRPs, and oversight costs to that date. Assuming the complying PRPs will continue to implement the RD/RA at the Site under the UAO, U.S. EPA expects to incur approximately $250,000 in future oversight costs. ~~Since~~ U.S. EPA recovered approximately $1.49 million allocated to the Site through the above-referenced bankruptcy settlement with Eagle-Picher, and a de minimis settlement with four other PRPs at the Site. Thus, U.S. EPA's unreimbursed past response costs in this case, which we seek in our Complaint, amount to approximately $704,000, excluding interest and U.S. DOJ's costs. We also seek a declaratory judgment for the future response costs, which include, among other things, U.S. EPA's future oversight costs at the Site.

IV. Settlement Negotiations History

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U.S. EPA initiated settlement efforts with the City in November 1995 immediately after it had issued the UAO to the PRPs at the Site. On November 5, 1995, the City submitted an initial settlement offer of $60,000 in full resolution of all U.S. EPA's claims. Settlement discussions occurred sporadically during 1996 between the City and U.S. EPA, without success. Then, in February 1997, the City increased its settlement offer to $120,000, again, in full resolution of U.S. EPA's claims. This offer was also declined by U.S. EPA.

Beginning in July 1997, the U.S. Department of Justice ("U.S. DOJ"), on behalf of U.S. EPA initiated settlement discussions with both the City and Decker, pursuant to U.S. Department of Justice procedures. Despite intense efforts and a series of correspondences and telephone conferences, the United States and the City were unable to reach any satisfactory accommodation, and the United States filed its Complaint in December 1997. The United States' final offer to the City prior to filing consisted of two settlement options. The first option involved payment of a total of $450,000 in return for a covenant not to sue from the United States for past costs only at the Site. The second option consisted of a payment of $1.34 million in return for a covenant not to sue and contribution protection for claims relating to U.S. EPA's past costs and civil penalties,

in addition to the past and future costs of the other PRPs' undertaking response action at the Site.[1/] The City declined both options in this final pre-filing offer of settlement. During the course of the five month settlement effort, the City did not modify its offer, made in February 1997, of settlement of all of the United States' claims for $120,000.

The pre-filing settlement negotiations with Decker resulted in an agreement for reimbursement of the United States' past costs in November 1997. Pursuant to this settlement agreement, Decker will reimburse the United States $250,000 in return for a covenant not to sue for past costs, civil penalties and punitive damages through the date of the agreement (November 12, 1997) and contribution protection for U.S. EPA's past costs at the Site. The Consent Decree was lodged with the Court on May 27, 1998 along with the United States' separate Complaint against Decker. Pursuant to the Court's Order of August 6, 1998, that action was consolidated with this one. The Consent Decree was subject to a public comment period that concluded on July 1, 1998. The City and Cooper and Corning, in their timely comments, have objected to the settlement between the United States and Decker. The United States is preparing a motion for entry of this Consent Decree.

Subsequent to filing, the United States and the City of Albion held additional settlement discussions during July 1998. On July 1, 1998, the City offered $400,000 in return for a global resolution of the United States' claims in this case. On July 16, 1998, the United States responded to the City's offer by indicating that the payment of $400,000 could be recommended to management at U.S. EPA and U.S. DOJ, only if combined with a commitment by the City to conduct or finance an equitable portion of the remedial response work at the Site. This response suggested that the City's contribution toward remedial response work could be in the form of "in kind" services associated with the operation and maintenance of the remedy at the Site once installed. The United States offered to work with the City to more specifically define the City's contribution to the remediation at the Site.

Following further discussions and exchange of information regarding the Site remedy, the City proposed a settlement which consisted of the $400,000 payment, in installments over 5 years, in addition to the City providing an "in-kind" contribution to

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1/ U.S. EPA performed an economic "ability-to-pay" analysis based on the City's five most recent annual budgets and Annual Reports prior to formulating this settlement proposal to ensure that the City experienced no economic hardship pursuant to either of the settlement options discussed.

the remedy consisting of up to one full-time equivalent employee with defined scope of work for up to 14 years. This offer was not acceptable to the United States, in part, because it did not provide for the implementation of the remedy's O & M, and in part, because it did not conform with U.S. EPA's "Policy for Municipality and Municipal Solid Waste CERCLA Settlements at NPL Co-Disposal Sites," 63 Fed. Reg. 8197 (February 18, 1998). After several further telephone conferences involving attempts to reach resolution, settlement discussions between the United States and the City ended.

V. United States' Settlement Position

The United States welcomes any efforts by the Court, and the parties, to facilitate the resolution the government's claims in this matter. Because of the complex, multi-faceted aspects involved in this case, i.e., among other things, the circumstances that two parties, Cooper and Corning are complying with U.S. EPA's UAO by performing the RD/RA at the Site; that the United States has a settlement agreement with Decker, and has settled with other de minimis parties, for reimbursement of a portion of its past costs incurred at the Site; that the United States has brought suit only against the City for claims for reimbursement of past costs and civil penalties; and that the parties have all brought contribution claims against one another, the Court's intervention and facilitation of a global resolution of all parties claims may be advantageous in resolving all claims. The United States sets forth the settlement position herein in the interest of avoiding litigation costs for all parties, while at the same time, ensuring the attainment of its statutory obligations under CERCLA.

The United States' principal objectives in this matter are three-fold: 1) protection of public health and the environment by ensuring the expeditious implementation of the selected remedial action at the Site, including completion of construction, as well as, the conduct of the operation and maintenance of the remedy for the necessary duration to ensure the long-term effectiveness of the remedy; 2) fulfillment of its obligations to the public trust by seeking maximum reimbursement of the costs incurred at the Site to the Superfund Trust Fund; and 3) assessment of sufficient civil penalties against the City for its noncompliance with the UAO to protect the integrity of the U.S. EPA enforcement program under CERCLA and ensure incentives for compliance by the City, and PRPs generally, with CERCLA requirements. Of course, in settlement, the parties' contributions must be consistent with statutory principles, United States' CERCLA policies, and represent fair and equitable resolutions of each parties' respective liabilities at the Site.

Since Cooper and Corning are expected to complete construction of the remedy at the Site, U.S. EPA has looked to

the other two parties, the City and Decker, to share in the undertaking of the O & M pursuant to the selected remedy. A settlement that results in the sharing of remedial responsibility by all parties will ensure that the Site remedy is constructed and implemented over the necessary foreseeable life of the remedy, and therefore, is favored by the United States. The issue would remain, however, of the respective parties' contribution claims, if any, against one another. Although the United States' settlement position discussed below addresses only the City's contribution, it does not preclude consideration by the Court of further contribution settlements among the parties.

With respect to its past cost claims, the United States seeks recovery of its unreimbursed response costs from the City. As discussed above, the amount of unreimbursed response costs currently is $704,000. Taking into account the recovery from the anticipated Court approval of the settlement with Decker, the amount of unreimbursed United States' costs is reduced to $454,000. The United States' settlement position with respect to the City discussed below, provides for the reimbursement of response costs that is consistent with U.S. EPA and U.S. DOJ policy and can be recommended to management of the government agencies for settlement.

We have already indicated to the City that the $400,000 cash payment it proposed to make to the United States is sufficient to resolve the United States' claims for pasts costs and civil penalties against the City, provided that the City undertakes or finances its equitable share of remedial action at the Site. We believe the total contribution to the Site requested of the City should be consistent with the Municipal Policy referenced above. The Municipal Policy provides for a presumptive baseline settlement amount of 20% of estimated response costs at a site for municipal owner/operator settlements.[2/] Since the total estimated response costs at the Site are:

$ 2.6	million — Site remedy capital costs
.538	million — O & M costs
2.19	million — U.S. EPA's past costs
.25	million — U.S. EPA's estimated future costs
$ 5.578	million — Total estimated Site costs,

the City's share of Site costs, therefore, should total $1.11 million. Thus, in addition to its payment of $400,000 in cash to the United States, the City would contribute a total additional

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2/ The City, of course, denies any liability under CERCLA at the Site. However, the United States at trial is prepared to show that the City is an operator of the Site pursuant to CERCLA under standards for operator liability at CERCLA sites recently set forth by the Sixth Circuit in United States v. Township of Brighton, Michigan, __ F.3d __, 1998 WL 526781 (6th Cir. 1998).

amount of $711,000 toward the Site remedy, in cash to finance the O & M, in in-kind services for the O & M, and/or contribution toward the other parties who are in compliance with the UAO.

Under this settlement position, the City and Decker would develop arrangements for performance of the O & M at the Site in concert with Cooper and Corning. Under the United States' settlement position, Cooper and Corning would complete construction of the remedy at the Site, and the City and Decker would combine efforts to perform the O & M at the Site, upon completion of the remedy. The four parties therefore, would combine efforts to work out the necessary details of the Site response action. The City's contribution to that effort should be as stated above.

The United States is prepared to work with all four parties in this matter to incorporate an agreement in a Consent Decree, substantially consistent with the U.S. EPA Model CERCLA RD/RA Consent Decree at 60 Fed. Reg. 38817 (July 28, 1995), for entry by the Court in this matter. The Consent Decree, of course, would include payment of $400,000 to the United States by the City, and must also provide for payment of the U.S. EPA's future oversight costs at the Site by the settling parties.

We believe the settlement terms set forth herein are the optimum that can be offered, consistent with U.S. EPA and U.S. DOJ policies, under the circumstances of the case. We do not anticipate that any further compromise is possible. Terms of settlement herein are more favorable than any offered to the City previously. Although the persons attending the Court's settlement conference on September 15, 1998 are prepared to recommend this settlement approach, final terms of settlement are subject to approval of appropriate management officials at the U.S. EPA and U.S. DOJ. We look forward to the settlement conference on September 15, 1998. Thank you for your consideration in this matter.

Respectfully,

For the United States:

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Jon - Can you please review this & get back to me ASAP? This must be filed by Fri. Thanks Connie

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SENT BY: FRANK BIROS

TO: CONNIE PUCHALSKI

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SPECIAL INSTRUCTIONS:

Draft Letter for Judge Scoville in Albion Case